IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. [redacted] 75 of 49

No. [redacted] 75

WILMETTE PARK DISTRICT,

Petitioner

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
Attorneys for Petitioner.

E. R. JOHNSTON
POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Of Counsel.

Chicago, Illinois.

THE BLAKELY-HARRIS PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. .....

WILMETTE PARK DISTRICT,

Petitioner

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Wilmette Park District, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on February 23, 1949, reversing the judgment of the District Court for the Northern District of Illinois.

OPINIONS BELOW.

The opinion of the District Court (R. 25-27; 41-44) is reported at 76 F. Supp. 924. The opinion of the Court of Appeals (R. 63-69) is reported at 172 F. (2d) 885.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 23, 1949. Rehearing was denied on March 18, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, 2101.

QUESTIONS PRESENTED.

1. Whether the Federal Government has the constitutional power to burden a local government by taxing its citizens' right to use park facilities which are provided for their benefit at less than cost.

2. Whether the Federal Government may constitutionally enforce collection of a penalty against another sovereign by seizure of the general funds of that sovereign raised by taxation.

3. Whether the Admissions Tax Statute, 26 U. S. C. 1700, should be construed to require the payment of a Federal tax on a charge made by a local government for the use of park facilities operated for the public benefit and not for profit.

ONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Internal Revenue Code:

Sec. 1700. Tax.

There shall be levied, assessed, collected, and paid—

(a) *Single or Season Ticket; Subscription.*—

(1) *Rate.*—A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription.

[This rate was increased to "1 cent for each 5 cents or major fraction thereof" by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516.]

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

Sec. 1704. Admission Defined.

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor.

Sec. 1718. Penalties. • • •

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected.

STATEMENT.

Petitioner, a body politic and corporate, organized in 1908 under the provisions of appropriate Illinois statutes,[1] has jurisdiction of four public parks within the Village of Wilmette (R. 41-42). The north end of Washington Park, which fronts on Lake Michigan, has been operated by petitioner as a public bathing beach for over 25 years (R. 42). The facilities supplied by petitioner in connection with this beach include a bathhouse, showers, toilets, washrooms, an automobile parking area, lifesaving equipment, floodlights, drinking fountains, and first aid personnel and supplies (R. 42). Maintenance men, lifeguards, clerical assistants, check room attendants, and policemen, are employed by the Park District for work at the beach (R. 42).

In order partially to defray the cost of maintenance and operation of the beach, petitioner charged a fee to "users of the beach and beach facilities" (R. 42-43). This fee was collected through the sale of tickets of various kinds. In 1943, for example, a family ticket priced at $4.00 entitled the purchaser and the members of his family to "Beach and Beach House Privileges" (R. 14 (a)). A higher price was charged if the privileges included automobile parking space (R. 14 (a)). Tickets were also sold on an individual season basis and also on a daily fee basis (R. 42). The trial court found that:

> "The charge made by the Park District for use of the beach and beach facilities is made to cover maintenance, operation, and some capital improvements. Over the years the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District" (R. 42-43).

1. Ill. Rev. Stat. (1945) c. 105, §§ 256-295.

As a matter of fact, the revenue from the fees has regularly been insufficient to meet current expenses, and it has been necessary to draw upon the general funds of petitioner in order to operate the beach (R. 14 (b)). These general funds are raised by levying taxes on the owners of real property located in the Park District (R. 19).

The tickets sold by petitioner to users of the beach and beach facilities have never carried any statement indicating that a part of the purchase price represented a tax due to the United States. No "admissions" tax has ever been collected from users of the beach and no part of the proceeds of the sale of tickets has ever been set aside to provide for payment of such a tax (R. 62).

On July 24, 1941, petitioner was notified by the Collector of Internal Revenue to collect an admissions tax on all beach tickets sold thereafter (R. 43). Petitioner refused to comply with this notice. Subsequently, and on three separate occasions, the Collector, acting under the supposed authority of the Penalties Section, 26 U. S. C. 1718, levied penalties against petitioner in the amount (plus interest) which the Collector claimed petitioner should have collected from the users of its beach facilities (R. 43-44). These penalties, aggregating $6,139.93, were enforced by means of distraint levies against the general funds of petitioner, and were paid under protest out of these funds. As stated above, these general funds were derived from tax revenues.

Claims for refunds were filed and rejected, and petitioner brought this action to recover the penalties illegally collected by respondent (R. 43-44).

The District Court held that petitioner's charge for the use of the beach and its facilities was not an admission charge within the meaning of Section 1700 of the Internal Revenue Code, thus avoiding the constitutional questions.

The Court of Appeals, giving the words of Section 1700

their literal dictionary meaning, held that petitioner was required to collect an admissions tax from the users of its beach facilities. The Court further held that petitioner's constitutional arguments were foreclosed by *Allen* v. *Regents*, 304 U. S. 439 (1938).

REASONS FOR GRANTING THE WRIT.

I.

IN HOLDING THAT CONGRESS HAS THE CONSTITUTIONAL POWER TO TAX A CITIZEN'S RIGHT TO USE PUBLIC PARK FACILITIES PROVIDED FOR HIS BENEFIT AND NOT FOR THE PURPOSE OF MAKING A PROFIT, THE COURT OF APPEALS ERRED IN DECIDING A QUESTION OF GENERAL IMPORTANCE AND FAILED TO GIVE PROPER EFFECT TO APPLICABLE DECISIONS OF THIS COURT.

The imposition of the admissions tax on the charge for use of petitioner's beach is an unconstitutional burden on a State activity which is immune from Federal taxation. By increasing the price of the tickets, and thus reducing the number of persons who can afford them, the tax unquestionably cuts into the revenues which are used to defray the cost of maintaining these park facilities. But what is more important, the tax reduces the ability of members of the community to use the park facilities which are provided for their benefit. The tax tends to deny access to the beach to some members of the community—those who could not afford to purchase the extremely valuable lake front property in the Wilmette area. This tendency of course varies with the tax rate, and also with the type of community involved, but its effect is directly opposed to the policy of the local government to minister to the health and recreational needs of its citizens. The direct interference with this policy is a burden on the local government.

And, because of the nature of the activity involved, it is an unconstitutional burden. Though the various opinions in *New York* v. *United States*, 326 U. S. 572 (1946) define the scope of State immunity from Federal taxation some-

what differently, all three opinions dealing with the constitutional problem[2] support petitioner's claim of immunity.

A.

Mr. Justice Frankfurter indicated that immunity should be allowed to "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations" (p. 582). As illustrative of such activities, he referred to State ownership of a State house and State income derived from taxation. Petitioner contends that this classification, which apparently includes activities which are unique simply because they are State activities, includes the maintenance of public parks.

Public hospitals, public schools, and public parks have their counterparts in private hospitals, schools, and country clubs; but from the point of view of intergovernmental relations, the activities are crucially different when State-owned. Thus if the Federal government imposes high admissions taxes on private health or educational institutions, the effect is only to limit access to such private institutions to a wealthy minority. But if the Federal Government should tax admission to public hospitals or admission to public schools, it would interfere with a function which a State is under a duty to perform for its citizens. It is no answer to say that the State would not be harmed so long as the admissions tax was levied on persons seeking admission to the schools or hospitals and not on the State institution itself. The State is injured to the extent that the tax creates a barrier between the citizen and the benefit which the State has undertaken to supply.

Police protection, fire protection, education, and health

2. The opinion of Mr. Justice Rutledge dealt only with the problem of statutory construction. As stated below, his reasoning is clearly applicable here.

are functions which a local government has a duty to perform for its citizens. From the point of view of intergovernmental relations, its citizens have a right to receive these benefits without having them burdened with Federal taxes. This is true even though similar services performed privately would be subject to taxation, because these services "partake of uniqueness" when performed by the local government as a public service for the whole community.

The maintenance of a public park is clearly this type of activity. See *Commissioner* v. *Sherman*, 69 F. (2d) 755, 759, and authorities cited (C. A. 1st, 1934). Commons, squares, and other open places designed to promote public relaxation, health, and recreation have been known in English-speaking communities for centuries. These parks are always maintained at public expense and for the benefit of the public. If a local government chooses to defray some of the cost of maintenance of a park by charging a fee to the users of its facilities, the essential nature of the activity is not changed. So long as the park is not run as a commercial enterprise for the purpose of making a profit, cf. *Chimney Rock Co.* v. *United States*, 63 Ct. Cl. 660 (1927), or is not just a private club as contrasted with a park maintained by the local government for the benefit of the general public, cf. *Exmoor Country Club* v. *United States*, 119 F. (2d) 961 (C. A. 7th, 1941), the conditions on which the local residents may enjoy the benefits of the program should be defined by the local government and not by another sovereign.

In constitutional terms the argument is the same whether the Federal Government taxes admission to public schools, admission to public hospitals, admission to the practice of law or medicine, or admission to a public golf course or bathing beach. It is true that in some of these examples the admission is not into an enclosed area of the type described by the literal wording of the admissions tax statute. But the constitutionality of the tax does not depend on

the presence or absence of a physical enclosure. The constitutional issue turns on the character of the governmental service being performed. The Federal Government has no greater power to deny a local citizen his right to enter a local park or to impair that right by taxation than it has to interfere with a right granted and defined by the State to receive medical or educational benefits.[3]

B.

The opinion of Chief Justice Stone in *New York* v. *United States*, 326 U. S. 572, 586 (1946), though taking a different approach than Mr. Justice Frankfurter to the problem of State immunity, also requires reversal of the court below. The question for the members of the Court who joined Chief Justice Stone is whether a Federal tax, even though it is not discriminatory "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government" (p. 587).

In the *New York* case, Chief Justice Stone could appropriately say that the tax on the business of selling mineral waters "does not bear on the State any differently than on the citizen" (p. 589). Similarly a tax on the sale of sand from petitioner's beach would not bear any differently on petitioner than on any other businessman, and therefore would not interfere with a sovereign function of government. But it cannot be said that the maintenance of public parks is such an activity "that its taxation does not unduly impair the State's functions of government" (p. 589). Even though the tax on a public park may super-

3. This is not to say that the Federal Government may not increase the local benefits. For example, the United States may offer financial aid to State schools on condition that they provide equal educational opportunities for all. That is, it may *assist* the local residents in gaining access to schools. But it has no constitutional power to *deny* State citizens access to State schools.

ficially resemble a tax on an exclusive country club, from the point of view of impairment of the state's functions of government the two taxes are essentially different. Only the former interferes with the local government's function of providing park facilities for the benefit of the general public. It is well settled "that the creation and maintenance of public parks is a governmental function of a state and its exercise is essential to the health and general welfare of all the citizens of a state." *Commissioner* v. *Sherman*, 69 F. (2d) 755, 759 (C. A. 1st, 1934).

Again, from the point of view of removing sources of revenue for the Federal Government, Chief Justice Stone's opinion points up the difference between the *New York* case and this case. As he there pointed out, "The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it" (p. 589). Such businesses as selling hard liquor, see *South Carolina* v. *United States*, 199 U. S. 437 (1905), or mineral water have been traditionally subject to federal taxation. In contrast, the maintenance of public parks, golf courses, or other recreational facilities have never been taxed by the federal government. Chief Justice Stone clearly regarded the maintenance of public parks as an immune activity:

> "A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general nondiscriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, *public parks*, or its revenues from taxes or school lands, even though all real property and all income on the citizen is taxed." 326 U. S. at 587-588. (Emphasis added.)

The question here is not whether the State may withdraw a business from the field of Federal taxation, but

rather whether the Court will permit an unprecedented expansion of the Federal field to include the traditionally immune non-commercial activity of maintaining public parks.

In view of the fact that this tax tends to frustrate petitioner's policy of providing park facilities for its citizens at minimum cost, there can be no doubt that it burdens petitioner in a manner prohibited by the reasoning of all the various opinions in the *New York* case, including the dissenting opinion of Mr. Justice Douglas.

C.

The holding of this Court in *Allen* v. *Regents*, 304 U. S. 439 (1938) that admission fees paid by spectators of State University football games are subject to the tax supports, rather than forecloses, petitioner's argument. Three characteristics of the charges made for the use of petitioner's beach distinguish them from charges for admission to athletic spectacles. First, the activities themselves—part of the public park programs maintained by the local governments for the benefit of their citizens—have traditionally been exempt from Federal taxation. Second, the fees are paid by the members of the community who are the intended beneficiaries of the governmental activity. And third, these charges are not calculated to make a profit, but merely to defray the cost of maintaining the public beach.

None of these three characteristics was present in the *Allen* v. *Regents* situation. First, the opinion in that case specifically describes college football as "a business comparable in all essentials to those usually conducted by private owners"; the State embarked "in a business which would normally be taxable"; it elected to raise funds to support a governmental activity "by conducting a busi-

ness" (304 U. S. 439, 451-452). That commercial activity did not itself become governmental merely because the profits were used to support governmental activities. Secondly, the fees which were there held subject to the admissions tax were paid by the general public, rather than the direct beneficiaries of the Georgia educational program. The tax was not imposed on the privilege of receiving education from the State;[4] it therefore did not create any barrier between the citizens and the benefit which Georgia had undertaken to supply. The tendency of the tax to exclude part of the general public from the games is not such a barrier because spectators do not go to football games for the purpose of getting an education. Thirdly, the football admission charges were calculated to make a substantial profit.[5] College football can be appropriately characterized as a "business enterprise conducted by the State for gain."[6]

The difference between this case and *Allen* v. *Regents* may be illustrated by two examples. If petitioner operated a motion picture theatre, or more precisely a professional athletic spectacle, in downtown Wilmette, and used the profits from that business to maintain the beach, the situation would fall squarely within the language of the *Allen* opinion:

"In final analysis the question we must decide is

4. In fact, the Georgia students were not even required to pay a tax on their admissions. See 304 U. S. 430, 450.

5. "'The important fact is that the State, *in order to raise funds* for public purposes, *has embarked in a business having* the incidents of similar enterprises usually prosecuted for private gain. If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes *by conducting a business*, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation." 304 U. S. 439, 452. (Emphasis added.)

6. 304 U. S. 439, 453.

whether, by electing to support a governmental activity through the conduct of *a business comparable in all essentials to those usually conducted by private owners,* a State may withdraw the business from the field of federal taxation.

"When a State *embarks in a business which would normally be taxable,* the fact that in so doing, it is exercising a governmental power does not render the activity immune from federal taxation." (Emphasis added.) 304 U. S. 439, 451.

But this language, which is the heart of the opinion, clearly does not apply to this case. The maintenance of public parks is an essential function of local government, historically and properly free from taxation by the Federal Government. Petitioner is not attempting to withdraw any business from the field of Federal taxation. On the contrary, respondent is trying to expand that field to include public parks even though they are non-commercial governmental activities, run not for profit but for the benefit of the general public. Such activities have never been burdened by taxation.

The second example which points up the difference between this case and *Allen* v. *Regents* would be an attempt by the Federal Government to levy a tax on the fees charged by a State school for tuition or for participation in a student athletic program. Such a tax would clearly be unconstitutional; there is no more justification for the tax involved here.

II.

IN HOLDING THAT THE FEDERAL GOVERNMENT MAY ENFORCE COLLECTION OF A TAX OUT OF THE GENERAL FUNDS OF A LOCAL GOVERNMENT, THE COURT OF APPEALS DECIDED A CONSTITUTIONAL QUESTION OF GENERAL IMPORTANCE WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner did not, in fact, collect any tax in connection with the sale of its tickets, nor did it make any profits from the operation of the beach. Consequently if petitioner is to be held liable for the penalties which respondent seeks to impose, these penalties must be paid out of petitioner's general funds which are derived from taxation of property located in the Wilmette Park District.

The Federal Government has no power to infringe the sovereignty of a local government by imposing a penalty which can only be paid out of its general funds. Assuming the duty of petitioner to pay the tax, or to satisfy a judgment for a tort, nevertheless such a duty cannot be enforced by a sheriff's levy, or by the collector's distraint levy, on petitioner's general funds any more than it can be enforced by a levy on a school house, a county hospital, or a court-house. One of the attributes of sovereignty is immunity from such process. The sovereign cannot be compelled by force to pay debts. Nor, if we are to be protected "from clashing sovereignty", see *M'Culloch v. Maryland*, 4 Wheat. 316, 429 (1819), can one sovereign have any greater power to punish another sovereign or to seize its property than any ordinary citizen has. The delicate nature of the relationship between the federal Union and the sovereign States comprising it requires the Federal Government to pay an even more exacting respect to this attribute of sovereignty. Cf. *Kentucky* v. *Dennison*, 24 How. 66 (1861); *Luther* v. *Borden*, 7 How. 1 (1849); *Coleman* v. *Miller*, 307 U. S. 433 (1939).

III.

IN HOLDING THAT CONGRESS INTENDED THE ADMISSIONS TAX TO APPLY TO CHARGES FOR USE OF PUBLIC BEACH FACILITIES, THE COURT OF APPEALS ERRED IN DECIDING A QUESTION OF GENERAL IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A.

The question of statutory construction is whether the charge made for the use of petitioner's beach is an "amount paid for admission to any place" within the meaning of this particular statute. The question cannot be answered by a purely literal construction of the statute. For there are many charges which fall within the literal wording but are not taxed because it is clear that Congress did not intend them to be taxed. The charge for the use of petitioner's park facilities is such a charge.

The history of the Admissions Tax Statute demonstrates the primary intent of Congress to tax admissions paid for the privilege of entering places of entertainment. In the statute's English antecedent "the expression 'admission' means admission as a spectator or one of an audience." *Attorney General* v. *Southport Corp.*, [1934] 1 K. B. 226, 236. The only "definition" of the term "admission" in the American statute states that the tax shall apply to charges for the use of "seats and tables, reserved or otherwise and other similar accommodations". 26 U. S. C. 1704. This provision, which is designed to treat "cover charges" in night clubs and similar places of entertainment as "admissions", characterizes the tax as one generally on entertainment. Though "cover charges" are literally charges for the use of chairs and tables, the statute treats them as admission charges. By specifically including these and no other use charges as admissions, Congress clearly indicated that other charges for the use of facilities were not intended to be covered.

Just as use charges which are not literally admissions are taxed, so are there many charges which are literally for admission to a place but which are not taxed because they are essentially use charges. For example, no tax is imposed on greens fees charged for admission to and use of golf courses. S. T. 357, I-1 C. B. 434. It is unreasonable to assume that Congress intended to discriminate between users of public beaches and users of public golf courses and similar public park facilities.

Similar examples are legion. The Chicago Park District maintains a parking area in Grant Park. Upon payment of an admission charge of 50¢, the driver of any automobile may enter the enclosure and remain for ten minutes or 24 hours—just as a purchaser of a daily beach ticket may use petitioner's beach facilities for ten minutes or all day. Although the 50¢ is literally an "amount paid for admission to any place", no admissions tax is levied on this fee.

Many state and local governments operate toll roads and toll bridges. Charges for the entrance upon and use of such roads as the Pennsylvania Turnpike are not taxed though they fall squarely within the literal meaning of "amount paid for admission to any place." See Note (1948) 42 Ill. L. Rev. 818, 821 n. 25.

Charges for the use of tennis courts, charges for the use of public ice skating facilities, charges for the entry into and use of transportation facilities, charges for entering parking lots,—all are literally within the statute, yet none are taxed.

Unquestionably subject to the admissions tax are charges for entrance into theaters, movies, concerts, lectures, dances, resorts, and athletic exhibitions of all kinds. These activities are usually conducted for profit; they all involve entertainment by listening or seeing, or by both.

But charges for the entry into and use of parking lots, toll roads, tennis courts, golf courses, and transportation facilities, which are not taxed, are of a different kind. The charges made for the use of these facilities, at least when they are run by a local government, are generally not calculated to make a profit, but instead are merely intended to place a part of the burden of supporting the activity on those who benefit from it. These activities involve the active use of facilities, and not merely the observation of spectacles.

The charge for the use of beach facilities clearly falls into the use charge category. It cannot be distinguished from the "greens fee" charge. Payment of the fee admits the golfer or swimmer to the area, and gives him the right to use the sporting facilities. In neither case is a spectacle witnessed, or is entertainment provided. The beach, like the tennis court and golf course, is not subject to this tax.

B.

In framing the Admission Tax Statute in general terms, Congress expressed no purpose to impose a tax on the privilege of enjoying public park facilities. At the time this broad language was chosen, Congress could not have had any idea that it might be applied to an essential activity of government such as this. If the Congress had intended to tax this type of state function, it would have said so explicitly. This point is clearly stated by Mr. Justice Rutledge in his concurring opinion in *New York* v. *United States*, 326 U. S. 572, 585 (1946):

> "With the passing of the former broad immunity, I should think two considerations well might be taken to require that, before a federal tax can be applied to activities carried on directly by the states, the intention of Congress to tax them should be stated expressly and not drawn merely from general wording

of the statute applicable ordinarily to private sources of revenue. One of these is simply a reflection of the old immunity, in the presence of which, of course, it would be inconceivable that general wording, such as the statute now in question contains, could be taken as intended to apply to the states.[1] The other is that, quite apart from reflections of that immunity, I should expect that Congress would say so explicitly, were its purpose actually to include state functions, where the legal incidence of the tax falls upon the state.[2]

---

1. To give removal of the immunity the effect of inverting the intention of Congress, in its later use of the same formula, is a leap in construction longer than seems reasonable to make.

2. Cf. 26 U. S. C. § 22(a) where Congress has specifically provided that compensation for personal service, includible in gross income, includes compensation for personal service as an officer or employee of a state, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing."

The general language of the Admissions Tax Statute evinces no Congressional purpose to tax the use of public park facilities. In fact, the available evidence points to a contrary intent. Treasury Regulations have recognized a distinction between tickets which entitle one to use facilities only on particular occasions, whether for a whole series of performances or for only one performance, and those which confer the right of unlimited entry during a particular period.[7] When sold by private clubs, the former

---

7. "An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an 'amount paid for admission' even though one of the privileges be the right to enter a clubhouse, club grounds, gymnasium, swimming pool, or the like * * *" Reg. 43 (1949), Sec. 101.2.

The price of the season ticket is paid to entitle the ticket holder regularly to go upon the beach. The regulation continues: "But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (*as contrasted with a more*

category is subject to the admissions tax, and the latter to the dues tax. Since the dues tax obviously does not apply to public park facilities, it would seem to follow that petitioner's season tickets, which grant a "more or less unlimited right to enter" the beach during the summer, would be tax free and that only the daily tickets would be subject to the admissions tax. But respondent could not ask for such an incongruous result because it is clear that Congress intended the two taxes to complement one another and to apply generally to the same types of activities. Therefore, to avoid inconsistency, respondent seeks to expand the scope of the admissions tax in order to treat public parks like private clubs. But is not the opposite result a fairer interpretation of Congressional intent? Congress distinguished between private clubs and public beaches for dues tax purposes; therefore it seems reasonable to assume that the same distinction was intended for admissions tax purposes. Congress did not intend to tax the use of public park facilities. The failure to apply the dues tax to the seasonal use of petitioner's park represents a consistent legislative policy only if the principle of statutory construction stated by Mr. Justice Rutledge is applied here. The general language of this statute, which was first drawn when Congress must have assumed public parks to be exempt from Federal taxation, is no evidence of intent to impose this tax on petitioner.

---

or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount so paid for such so-called membership is an 'amount paid for admission' * * *" [Emphasis added.]

A season ticket entitles its holder to unlimited entry onto and use of the beach as many times as desired during the season, the category not subject to this tax. This regulation clearly has the effect of exempting petitioner's season tickets from the admissions tax.

C.

Finally, the Court should adopt the construction of the statute which will avoid the constitutional questions. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62. *Ashwander* v. *Valley Authority*, 297 U. S. 288, Brandeis, J. concurring at 348; cf. *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106 (1948). By adopting a reasonable construction of the statute, the District Court recognized its duty in this regard. The Court of Appeals, however, ignored this "cardinal principle" of statutory construction.

Conclusion.

This case is of great importance to local governments throughout the country. In the Chicago area alone, between Gary, Indiana, and Lake Bluff, Illinois, there are 29 municipally operated bathing beaches (R. 43). Comparable park facilities must number in the thousands since the ruling in this case affects many types of sports activities—golf, tennis, skating, bathing, and any others that may be carried on only within a defined area. The constitutional issue cuts across the whole scope of local governmental functions. The case warrants the careful consideration of this Court.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HENRY J. BRANDT,
E. R. JOHNSTON GILBERT H. HENNESSEY, JR.,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Chicago, Illinois,
Of Counsel.